S.1400

20 May 1974

MEMORANDUM FOR THE RECORD

SUBJECT: Meeting on Proposal by CIA to Amend the National Security Act of 1947

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1. On 16 May 1974, [redacted] and the undersigned met with Messrs. Ezra Friedman, Roger Pauley, and Ronald Gainor of the Justice Department to discuss legislation proposed by CIA to amend the National Security Act of 1947 to create a new criminal offense for unauthorized disclosure. The Department of Justice, in a letter to the Director of the Office of Management and Budget, recommended against submission of the legislation to Congress.

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2. [redacted] asked if the real reason Justice opposed the legislation was more political than substantive. Mr. Friedman replied that this was the wrong time to seek such legislation in Congress, but he also had substantive problems. He felt the in camera proceedings raised serious constitutional problems, that the penalty was too harsh, and that the legislation covered too many people.

3. The undersigned discussed the in camera problem. I asked Mr. Friedman what constitutional problems concerned him in view of the fact that in camera proceedings had been tolerated by the Court in the Lopez and Bell cases, provided that defense counsel participated and that the in camera hearing was limited in scope to collateral issues not related to the guilt or innocence of the defendant. I also gave Mr. Friedman a copy of my memorandum on the subject dated 15 May 1974. Mr. Friedman replied that Subsection (5) did not make it clear that the defense counsel would participate. I assured him that the Subsection would be rewritten to clarify our position on this point.

4. In any event, Mr. Friedman did not think in camera proceedings would be very effective to prevent disclosure of confidential information, if a defendant really wanted to publish. He pointed out that a defendant who is enjoined from publishing by a court order could decide to publish anyway and then be jailed for contempt of court. According to Mr. Friedman the remedy of habeas corpus would extend to the case in which event the reviewing court would have to examine the information the Government claimed was classified for national security reasons to determine if the injunction was valid. Mr. Pauley disagreed. He felt that the reviewing court would only have to determine whether the court order had been violated by a defendant.

5. Mr. Friedman, who has worked on many of the Selective Service Act cases, relies heavily on Estep v. United States, 327 U.S. 114 (1946), for his views on judicial review. Estep involved disobedience of an induction order into the U. S. Army under the Selective Service Act. Under the Act, actions of local draft boards were considered final and not subject to judicial review. Estep was jailed and filed a writ of habeas corpus. The Court held that if a registrant under the Selective Service Act could not defend at his trial on the ground that his local draft board acted beyond its jurisdiction, the way would then be open to him to challenge the jurisdiction of the local board after conviction by habeas corpus. It is still not clear to me how Estep would be relevant to the in camera procedure proposed in Subsection (5), unless Mr. Friedman is assuming that a defendant would violate a court injunction against publication of classified materials and thus be held in contempt of court.

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6. Mr. Pauley then discussed Section 1124 of the proposed Federal Criminal Code which would expand the Scarbeck rule to include disclosure to anyone, not merely communists and foreign agents. Mr. Pauley thought 1124 was preferable to Subsection (5) because 1124 does not provide for automatic judicial review. Mr. Pauley thought CIA was making a mistake to provide for judicial review as Subsection (5) now does. He also felt the arbitrary and capricious standard might be interpreted too broadly by the Courts.

7. Mr. Pauley also noted that 1124 is being rewritten to provide for exhaustion of administrative remedies with respect to classification questions before judicial review is authorized. Mr. Pauley envisions an "elaborate ICRC" in this regard. Mr. Pauley thought that such a pre-judicial review might have helped us in the Marchetti case.

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8. At the conclusion of the meeting, Mr. Pauley stated that he now felt that CIA was not adequately protected by existing law and that further protection was necessary. Mr. Friedman disagreed. Both Mr. Pauley and Mr. Gainor agreed that as a matter of political reality this was not the right time to approach Congress for legislation in the secrecy field. They also were of the opinion that S. 1400 would have a far better chance of being enacted than the legislation proposed by CIA. Mr. Gainor admitted, however, that S. 1400 probably is at least two and one-half years from passage. He also noted that the House Judiciary Committee is so tied up now with the impeachment inquiry that not much more will be accomplished this year.

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9. [redacted] said that the DCI has strong views on his need for more adequate protection in support of his statutory responsibilities and may decide to go forward with the legislation proposed by CIA in any event. The Justice representatives were clearly opposed to the DCI doing so, not only because of the present political atmosphere, but because the CIA legislation would conflict with -- and perhaps even jeopardize -- S. 1400.

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[redacted]
Assistant General Counsel

cc: OLC